INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	2
Argument	7
Conclusion	13

CITATIONS

Cases

Page

Aaron Ferer & Sons v. Richfield Oil Corp. (C.C.A. 9th, 1945), 150 F. 2d 12, 15 7

Cervin v. W. T. Grant Co. (C.C.A. 5th, 1938), 100 F. 2d 153 11

Commercial Banking Company v. Martel (C.C.A. 2d, 1941), 123 F. 2d 846 12

Dagley v. Armstrong Rubber Company (C.C.A. 7th, 1965), 344 F. 2d 245 .....5, 11

General Motors Corp. v. Wolverine Ins. Co. et al. (C.C.A. 6th, 1958), 255 F. 2d 8 7

Hughes v. Lawyers Trust Co. (C.C.A. 2d, 1940), 10[illegible] F. 2d 792, 794 8

Leimer v. Woods (C.C.A. 8th, 1952), 196 F. 2d 828 11

Lindroth v. Walgreen Co. et al., 407 Ill. 121, 94 N. E. 2d 847 (1950) 9

Lovas v. General Motors Corp. (C.C.A. 6th, 1954), 212 F. 2d 805 7

McNaughton v. New York Central Railroad Company (C.C.A. 7th, 1955), 220 F. 2d 835 12

Partmore v. Paramount Theaters Corp., 347 U. S. 89, 90, 91, 98 L. Ed. 532 (1959) 8

CITATIONS—Continued

Cases—Continued

Page

Trout v. Pennsylvania Railroad Co. (C.C.A. 3d, 1962), 300 F. 2d 826 12

Ucci v. Keane, 402 Pa. 467, 167 A. 2d 147 (1961) 7

University City, Mo. v. Home Fire and Marine Insurance Co. (C.C.A. 8th, 1940), 134 F. 2d 288 11

United States v. Moser, 266 U. S. 236 (1924) 9

United States Rubber Co. v. Bauer (C.C.A. 8th, 1963), 319 F. 2d 463 7

Yates v. United States, 354 U. S. 298 (1957) 9

Zesch v. Abrasive Co. of Philadelphia, 353 Mo. 558, 183 S. W. 2d 140, 156 A.L.R. 469 (1944) 10

IN THE

United States Supreme Court

October Term A. D. 1965

No. ———

JOHN R. HURLEY and THE MERCHANTS NATIONAL BANK OF MUNCIE, Co-Executors of the Estate of Anson G. Hurley, Deceased,
JOHN R. HURLEY, Special Administrator of the Estate of Shirley P. Hurley, Deceased,
W. GALE PHENEGER and THE MERCHANTS NATIONAL BANK OF MUNCIE, Co-Administrators of the Estate of Inez Elizabeth Hurley, Deceased,

Petitioners,

v.

BEECH AIRCRAFT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion and the opinion of the Court of Appeals for the Seventh Circuit and the concurring opinion are reported in 355 F. 2d 517 and also appear in the Appendix of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

When there is a common question of fact necessary to maintain a cause of action in negligence and in breach of an implied warranty, and the fact finder finds upon this common question adverse to plaintiff on the negligence count, is there prejudicial error committed in dismissing the breach of implied warranty count?

STATUTE INVOLVED

There are no statutes involved in this case. Petitioners assert that Rule 61, Federal Rules of Civil Procedure, is involved. This rule provides:

> "Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

This action arose when an airplane owned and operated by Anson G. Hurley crashed. Prior to the crash the plane was being flown in bad weather at 11,000 feet. Although the weather at 7,000 feet was clear, the plane was being

flown at 11,000 feet because the pilot desired to get instrument time.

When the plane was near Fredonia, Ohio, it was first seen by observers at 7,000 feet where it went through a series of violent maneuvers which imposed forces in excess of its designed strength. This resulted in a separation of the left wing from the fuselage.

The airplane had been manufactured by Beech Aircraft Corporation and sold to Anson G. Hurley by an authorized dealer. Following the crash, suit was filed against Beech Aircraft Corporation in two counts. The first count was for breach of implied warranty and alleged that the left wing of the airplane was not properly designed, constructed and assembled and was not properly and securely fastened or attached to the fuselage. The second count was in negligence, and substantially the same allegations were made that the defendant was guilty of negligence in the design, manufacture, assembly and sale of the said aircraft in that the aircraft was defective, not airworthy and unsafe for flight and use in the manner and for the purposes for which it was designed and intended, in that the left wing thereof as designed, constructed and assembled by the defendant was not properly and securely fastened or attached to the fuselage and as a consequence became detached from the fuselage while said aircraft was in flight causing said aircraft to crash to the ground.

All questions concerning the design of the airplane were removed when Petitioners' expert witness testified that the method of attaching the wings was good. The District Court's action in dismissing this allegation has never been challenged by Petitioners.

Thus, the entire controversy resolved itself to the ques-

tion of whether the upper left attachment bolt, which is one of four bolts used to attach the left wing to the fuselage, was over-torqued to failure, stripped or weakened in any way so that the wing would not withstand the negative and positive loads for which the aircraft was designed.

Contrary to Petitioners' assertion, the over-torqueing of the nut and bolt in and of itself would not weaken the attachment of the wing to the fuselage. The only way this attachment would be weakened is if the nut and bolt were over-torqued to failure.

Beech Aircraft Corporation defended on three grounds: (1) that there was no defect in the attachment of the left wing to the fuselage in that the attachment bolt was not over-torqued, (2) that it was physically impossible to over-torque the attachment bolt to failure under the methods of manufacture, and (3) that the airplane failed because loads in excess of the design limits of the airplane were imposed thereon during the loss of control of the plane.

To support the defense that there was no defect in the attachment of the left wing to the fuselage, Beech Aircraft introduced an abundance of evidence. This evidence consisted of testimony from expert witnesses who examined the bolt in question, tested this bolt, examined the nut in question, compared both the bolt and the nut to others which were subjected to controlled torqueing. These witnesses were of the opinion that the involved bolt was not over-torqued, was not stripped, was not sheared and was not weakened in any way when the aircraft was manufactured.

To support the defense that it was physically impossible to over-torque the involved bolt to failure, Beech Aircraft Corporation introduced evidence of testing and demonstra-

tions to illustrate that it was physically impossible to overtorque the involved bolt to failure.

To support the defense that the plane failed because loads were imposed thereon above the designed limits of the airplane, Beech Aircraft Corporation introduced evidence from eye-witnesses who saw the airplane break out of the cloud cover intact. They saw it go through a series of violent maneuvers at various attitudes and speeds. They heard the motor roaring, revving up and the like, and they then saw the wing separate and the plane fall to the ground. Expert witnesses who examined the wreckage were then called. They testified that they found evidence of the imposition of high negative and positive loads upon the plane. They also testified that it would be impossible to have any negative or positive loads imposed upon the airplane after the separation of the wing from the fuselage. This, they explained was true because of the necessity of having all flying surfaces intact before any loads could be imposed.

The District Court found that there were no defects in the airplane. The District Court also found that Beech Aircraft was not negligent in the manufacture or assembly of the airplane.

These findings were never questioned by Petitioners.

The appeal taken by Petitioners was based upon the District Court's dismissing Count I of their complaint which was based upon the requirement of privity in the breach of an implied warranty action. Following this decision the Court of Appeals for the Seventh Circuit held in *Dagley v. Armstrong Rubber Co.* (C.C.A. 7th, 1965), 344 F. 2d 245, that privity was not essential for an action for breach of an implied warranty under Indiana law. In deciding this

appeal, however, the Appeals Court held that there was no prejudicial error committed in dismissing Count I of the complaint, as the essential fact common to both counts, the existence of a defect, was decided in the negligence action; and under the doctrine of collateral estoppel by judgment, Petitioners are barred from proceeding under the breach of implied warranty count.

ARGUMENT

The holding that there was no prejudicial error committed in dismissing Count I of Petitioners' complaint is correct.

The Appeals Court held that proof of the existence of a defect is a prerequisite to a cause of action grounded in negligence as well as one for breach of an implied warranty.

This holding is in conformity with previous decisions upon this subject.

United States Rubber Co. v. Bauer, (C.C.A. 8th, 1963), 319 F. 2d 463;

General Motors Corp. v. Wolverine Ins. Co. et al. (C.C.A. 6th, 1958), 255 F. 2d 8;

Lovas v. General Motors Corp. (C.C.A. 6th, 1954), 212 F. 2d 805;

Ucci v. Keane, 402 Pa. 467, 167 A. 2d 147 (1961).

Petitioners have conceded that a defect is a pre-requisite to recovery in either a negligence action or an action for breach of an implied warranty.

The holding, that no prejudice can occur when one count of a complaint is dismissed, if the facts essential to a cause of action under that count are established in trial upon another count, is not in conflict with decisions of the courts of other circuits nor with the opinions of this Court.

In *Aaron Ferer & Sons v. Richfield Oil Corp.* (C.C.A. 9th, 1945), 150 F. 2d 12, 15, appellant complained of the

trial court granting a motion to dismiss count one of his complaint. The Court held:

> "Ferer also contends that the district court erred in dismissing the first count of the complaint seeking a declaratory judgment. Such, if error, was harmless, since the issue there presented was decided on the trial of the second count and counterclaim."

The same result was reached in *Hughes v. Lawyers Trust Co.* (C.C.A. 2d, 1940), 108 F. 2d 792, 794, where the Court held:

> "The assignment of the bonds as collateral security was valid unless rendered voidable by the New York Stock Corporation law. So the issue of fact raised by the counts under Section 60 of the Bankruptcy Act were precisely the same as the issues of fact presented by the count under the New York Stock Corporation law, and the issues on the latter count were sent to the jury. If dismissal of the counts based on Section 60 of the Act was error, the error was harmless and is to be disregarded. Rule 61, Rules of Civil Procedure, 28 U.S.C.A. following section 723c."

In the instant case the fact essential to maintain an action under either count of the complaint was the existence of a defect in the airplane.

The District Court found that the airplane in question was not defective; hence, the Court of Appeals correctly applied Rule 61, Federal Rules of Civil Procedure.

In *Partmore Corp. v. Paramount Theaters Corp.*, 347 U. S. 89, 90, 91, 98 L. Ed. 532 (1959), this Court held:

> "We have often held that under the doctrine of res judicata a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein. But a prior

judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit '*only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.*' This latter aspect of res judicata is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation." (Emphasis added)

The Appeals Court followed the mandate of this Court when it determined that the finding of no defect was essential and common to both the Petitioners' count in negligence and the count in breach of implied warranty and estopped them from attempting to prove this same fact in a subsequent action.

United States v. Moser, 266 U. S. 236 (1924), and *Yates v. United States*, 354 U. S. 298 (1957), also sustain the proposition that a fact established in one action cannot be disputed in a subsequent action.

Petitioners argue the rules regarding collateral estoppel as enunciated by this Court are inapplicable because of their assertion that the rule and quantum of evidence are different in a negligence action than in a breach of warranty action. This assertion is incorrect. There are no different rules and there is no difference in the quantum of evidence necessary to prove a defect.

In *Lindroth v. Walgreen Co. et al.*, 407 Ill. 121, 94 N. E. 2d 847 (1950), an action was brought for breach of implied warranty. In *Lindroth* a vaporizer was purchased and while in use it caught fire. The Court held that the unexplained fire was sufficient to create an inference of a defect in a warranty action.

In *Zesch v. Abrasive Co. of Philadelphia,* 353 Mo. 558, 183 S. W. 2d 140, 156 A.L.R. 469 (1944), an action was brought for negligence when a grinding wheel disintegrated. The Court held that the unexplained disintegration of the grinding wheel was sufficient to create an inference of a defect in a negligence action.

Hence, it is clear that the same quantum of evidence is necessary to show a defect, irrespective of what theory of law is being pursued.

Petitioners misconceive the rules of evidence in products liability cases when they rely upon nine cases cited on Pages 7 and 8 of their petition. These cases all involved situations where there was no contest as to the existence of a defect. In breach of warranty cases where there is no admitted defect, then of course evidence of due care is not admissible. But this is not the situation here. If the existence of a defect is contested, then certainly all evidence showing that one was not present, or the impossibility of such defect being present, is admissible.

Contrary to Petitioners' assertion, the great abundance of the evidence offered by Beech Aircraft Corporation was directed to prove (1) no defect, (2) the impossibility of a defect, and (3) the reason why the airplane failed.

Petitioners attempt to show a misapplication of Rule 61 by citing several cases wherein various appeals courts have found prejudicial error. All of these cases can be distinguished upon their facts and all of them are merely an example of an appeal court exercising its discretionary powers as a review court. The question presented by the case at bar turns upon its own facts and is not a deviation from recognized principles in the application of the rule, thus no question is presented by Petitioners. In fact no

reason is advanced by Petitioners to invoke the jurisdiction of this Court to entertain the petition. The Appeals Court recognized and dealt with the question of the impact of their decision and its significance when it said:

> "We had not decided *Dagley v. Armstrong Rubber Company,* 7 Cir., 344 F. 2d 245 (1965), at the time the trial court in the instant case dismissed count I for lack of privity of contract. Retrospectively, such dismissal was erroneous. However, under the facts of this case, it was not prejudicial to plaintiffs because of the bar raised by the doctrine of estoppel by judgment, as above set out.
>
> "The problem presented by this appeal will not likely recur as long as the rule in *Dagley,* with reference to lack of privity in contracts, is recognized as the law of Indiana."

The Petitioners here have not demonstrated any reason in their petition to invoke the jurisdiction of this Court under Rule 19.

Brief references attest to the inapplicability of the decisions relied upon by Petitioners.

University City, Mo. v. Home Fire and Marine Insurance Co. (C.C.A. 8th, 1940), 134 F. 2d 288, involved inadmissible evidence which was given so much prominence before the jury that the Appeals Court felt that the verdict was infected with error.

Leimer v. Woods (C.C.A. 8th, 1952), 196 F. 2d 828, was reversed because of an erroneous judgment. *Cervin v. W. T. Grant Co.* (C.C.A. 5th, 1938), 100 F. 2d 153, was reversed because evidence was excluded. The excluded evidence was on a question upon which there was evidence from two witnesses which was in direct conflict. The

Court felt the plaintiff should be permitted to corroborate his version of the accident.

Commercial Banking Company v. Martel (C.C.A. 2d, 1941), 123 F. 2d 846, again, involved the exclusion of evidence and the Court felt a party should be permitted to explain entries on a bankruptcy schedule.

Trout v. Pennsylvania Railroad Co. (C.C.A. 3d, 1962), 300 F. 2d 826, involved a jury trial wherein the Court dismissed one count under the Safety Appliance Act and submitted the second count under the FELA to the jury. In determining the questions under the FELA count, the jury was asked if the brake involved was defective and the jury answered that it was not. The appellee argued that dismissing the count under the Safety Appliance Act was not prejudicial since the jury found that the brake was not defective. The Appeals Court held that since the Court failed to instruct the jury on the standard applicable in determining whether the brake was defective, the answer to the interrogatory was meaningless. The standard applicable under the SAA is that the brake was inefficient even though operated in a normal, natural and usual manner. There was no instruction on this standard, nor was there any argument thereon. This is quite different than the case at bar. Here, the question of a defect which was common to both counts of Petitioners' complaint was decided by the District Judge. This finding, which was never attacked, was supported by substantial evidence. This finding precludes further inquiry into the same question of the existence of a defect.

The final case cited by Petitioners is *McNaughton v. New York Central Railroad Company* (C.C.A. 7th, 1955), 220 F. 2d 835. In this case defendant was denied the right to assert a defense. This, again, is quite different than in

the instant action. The Petitioners were given every opportunity to prove a defect in the airplane and they failed. There was no defect in the airplane. Petitioners do not now claim they have any new evidence to prove a defect in the airplane. A new trial would serve no purpose.

In the last analysis, this case presents only one question to be determined by its facts. This question is, "did the Appeals Court err when it held that there was no prejudicial error committed in dismissing Count I of the Petitioners' complaint because of a finding upon Count II that there was no defect in the airplane?" Justice is not frustrated by refusing to permit Petitioners to retry a factual question already decided.

CONCLUSION

The Petition for a Writ of Certiorari not presenting any jurisdictional grounds should be denied.

Respectfully submitted,

ERLE A. KIGHTLINGER,
HOWARD J. DeTRUDE, JR.,
HARRY A. WILSON, JR.,
Attorneys for Respondent.

KIGHTLINGER YOUNG GRAY
& HUDSON,
Sixth Floor First Federal Building,
Indianapolis, Indiana - 46204,
Of Counsel.